COURT OF APPEALS
DECISION
DATED AND RELEASED

December 28, 1995

NOTICE

No. 93-2968

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

EUGENE PARKS,

Petitioner-Appellant,

v.

CITY OF MADISON,
MAYOR PAUL R. SOGLIN,
AND JOHN C. HAMILTON, HUMAN RESOURCE
DIRECTOR OF THE CITY OF MADISON,

Respondents-Respondents.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed*.

Before Eich, C.J., Dykman and Sundby, JJ.

SUNDBY, J. In this appeal, we hold that petitioner, Eugene Parks, the City of Madison's former Affirmative Action Officer, was not subject to suspension and discharge under § 3.35(16) of the City's Civil Service Ordinance. He is not, however, entitled to reinstatement. On July 1, 1986, Parks was

appointed to a five-year term as the City's Affirmative Action Officer, pursuant to § 3.58(2), Madison General Ordinances (MGO). That term has expired. He was not entitled to reappointment but only the opportunity to be reappointed. However, he is entitled to the wages and benefits of his office during his term, subject to the customary offsets for wages and benefits earned during that period in mitigation of his damages. We therefore reverse the order of the circuit court dismissing Parks's petition and remand the cause to the circuit court to determine and award Parks his lost wages and benefits from the date of his discharge, October 6, 1988, to the expiration of his term.

The City argues that § 3.58(2), MGO, made § 3.35(16), MGO, applicable to the position of Affirmative Action Officer. Section 3.58(2) provides in part:

> The ... Affirmative Action [Officer] shall hold office for a term of five (5) years and until a successor is appointed. The ... Affirmative Action [Officer] shall receive all the benefits and incidents of civil service subject to the five (5) year term.

The City argues that the civil service disciplinary procedure, § 3.35(16), MGO, is a "benefit" or "incident" of civil service. However, § 3.35(16) applies only to persons "holding positions in the civil service." It is undisputed that Parks does not hold a position in the civil service. By ordinance no. 6691, effective August 4, 1979, the Madison Common Council created § 3.35(1)(w), which specifically excludes the position of Affirmative Action Officer from civil service.

The City argues that § 3.58(2), MGO, is more specific than § 3.35(1)(w), MGO, and therefore § 3.58(2) controls. However, this rule of construction does not apply when statutes or ordinances are a part of the same enactment or enacted simultaneously. When statutes or ordinances are *in pari materia*,[1] the provisions of each are to be construed together. The amendment to § 3.58(2) was made by ordinance no. 6692 at the same meeting at which

[1] *In pari materia* means: "Upon the same matter or subject." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

ordinance no. 6691 excluded the office of Affirmative Action Officer from the City's civil service. Therefore, §§ 3.35(1)(w) and 3.58(2) are *in pari materia* and must be construed together.

> When determining the meaning and effect of statutory sections *in pari materia*, "[i]t is assumed that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they should all be construed together."

Boucher Lincoln-Mercury v. Madison Plan Comm'n, 178 Wis.2d 74, 89, 503 N.W.2d 265, 270 (Ct. App. 1993) (quoting ***State Farm Mut. Auto. Ins. Co. v. Kelly***, 132 Wis.2d 187, 190, 389 N.W.2d 838, 839 (Ct. App. 1986) (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 453 (Sands rev. 4th ed. 1984) (footnotes omitted))). It is further the rule that: "Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible." ***Id***. at 90, 503 N.W.2d at 270 (quoting 2B N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 122 (5th ed. 1992)).

When the common council created the position of Affirmative Action Officer, June 22, 1973, ordinance no. 4246, the City's civil service system was already in existence. Robert J. Corcoran, *An Administration History of the City of Madison, Wisconsin 1836-1977*, at 7-8 (1977) (civil service ordinance enacted in 1937).

When the common council amended the affirmative action ordinance, § 3.58(2), MGO, it plainly intended to establish a term of office for the Affirmative Action Officer. It did not, however, change the method of appointment of the Affirmative Action Officer. Section 3.58(2) provides that the Affirmative Action Officer shall be "appointed by the Mayor subject to the approval of the Common Council and shall be directly responsible to the Mayor and Council." Officers so appointed are removable only by the common council, for cause. Section 17.12(1)(c), STATS. Removals for cause may be made only upon written verified charges brought by a resident taxpayer of the city,

"and after a speedy public hearing at which the officer shall have full opportunity to be heard to present a defense against the charges, personally and by counsel." Section 17.16(3), STATS. The mayor denied Parks a public hearing.

A city officer, by whomsoever appointed, subject to confirmation or concurrence by the common council may be removed by the common council only by an affirmative vote of three-fourths of all the members thereof. Section 17.12(1)(d), STATS. In contrast, a city officer who holds a position in the civil service is removable by the appointing authority. *See* § 3.35(16)(a), MGO. The officer is not entitled to a public hearing, and his or her removal is not subject to review by the common council. This procedure is consistent with the philosophy of civil service. A civil service system is intended to insulate public officers and employees from the influences of the political process. ***Castelaz v. City of Milwaukee***, 94 Wis.2d 513, 523, 289 N.W.2d 259, 263 (1980), *rev'd in part on other grounds*, ***Lindas v. Cady***, 183 Wis.2d 547, 515 N.W.2d 458 (1994). However, public officers who carry out the policies of the governing body, which are sometimes very political, are usually excluded from the civil service process and are made responsible to the governing body.

The City's construction of §§ 3.35(1)(w) and 3.58(2), MGO, would require us to conclude that the common council, by its amendment to § 3.58(2), intended to relinquish its control over the Affirmative Action Officer. We reject the notion that the common council simultaneously excluded the Affirmative Action Officer from the City's civil service system and put the officer back under civil service.

Certainly, the disciplinary procedure provided by § 3.35(16), MGO, is not a "benefit" to an appointive city officer who would otherwise be subject to the protections of §§ 17.12 and 17.16, STATS. If the Affirmative Action Officer is subject to suspension and removal under § 3.35(16), he or she loses substantial benefits and protections. A city officer removable only for cause under § 17.12(1)(c), if suspended pending a public hearing but reinstated, is entitled to all of the emoluments of the office for all of the time that he or she would have served had he or she not been suspended. Section 17.12(3) provides: "If such charges are dismissed, the officer so suspended shall thereby be restored to office and be entitled to the emoluments of the office for all of the time the officer would have served therein had the officer not been suspended." In contrast, under § 3.35(16)(a), a person holding a position in the civil service is subject to suspension without pay for an almost indefinite period because,

although the initial period of suspension may not exceed 30 days in one year, extensions of suspensions may be made pending investigation and hearing. An officer subject to § 3.35(16) is not entitled to a public hearing and may not have his or her removal reviewed by the common council. It is illogical and unreasonable to conclude that the common council intended by the amendment creating a term of office for the Affirmative Action Officer to insulate that officer from the control of the common council. The office of Affirmative Action Officer is a sensitive position, avowedly implementing employment policy as formulated by the governing body.

The City and the dissent rely on § 17.12(4), STATS., which creates a general exception to the removal and suspension of city officers as follows: "But no officer of any city, *appointed according to merit and fitness under and subject to a civil service* or to a police and fire commission law, or whose removal is governed by such a law, shall be removed otherwise than as therein provided." (Emphasis added.) However, the Affirmative Action Officer is not appointed according to merit and fitness under the civil service law. The Affirmative Action Officer is appointed as city policy officers are customarily appointed, by the mayor subject to confirmation by the common council. Further, the Affirmative Action Officer is reappointed by a unique procedure. *See* § 3.58(2), MGO. The mayor may choose to present the name of the incumbent to the common council for confirmation or may elect not to submit the name of the incumbent to the common council. Only in the latter case is the Affirmative Action Officer subject to appointment under the civil service ordinance. Parks was never subject to that procedure because he was discharged during his first term.

Accordingly, we reject the City's argument that the disciplinary procedure under the City's civil service ordinance is a "benefit" or "incident" of the office of Affirmative Action Officer. According to the City's construction, the exclusion of the Affirmative Action Officer from the civil service system by § 3.35(1)(w), MGO, was meaningless because every provision of the civil service law is "incident" to the Affirmative Action Office. This is an unreasonable construction of the ordinance which we must reject. *See* ***Falk v. Falk***, 158 Wis.2d 184, 189, 462 N.W.2d 547, 548 (Ct. App. 1990).

The City urges us to hold that Parks is not entitled to the equitable remedy of mandamus because: (a) he unreasonably delayed asserting his claim that he could be removed from office only under §§ 17.12 and 17.16, STATS.;

(b) he failed to assert this claim in the administrative and judicial proceedings he initiated to recover his office; and (c) his failure to assert his ch. 17, STATS., claim prejudiced the City. The City argues that the elements of laches are thus satisfied. *See* ***Ozaukee County v. Flessas***, 140 Wis.2d 122, 127, 409 N.W.2d 408, 410 (Ct. App. 1987). We reject the City's argument.

The City can hardly argue that Parks has not asserted a right to his office or contested his removal. He appealed to the Madison Personnel Board; pursued an unsuccessful civil rights action in the federal court (***Eugene Parks v. City of Madison, et al.***, No. 89-C-591-C); prosecuted unsuccessfully an action in Dane County Circuit Court challenging the provisional appointment of Ms. Kirbie Mack as provisional Affirmative Action Officer (***Eugene Parks v. City of Madison, et al.***, No. 89-CV-3315); and began this action March 19, 1991, seeking a writ of mandamus or, alternately, a declaratory judgment, ordering the City to reinstate him and restore his lost salary and benefits. The City's argument is that Parks waited an unreasonable period of time before he discovered and asserted his ch. 17, STATS., defense. Parks had no obligation to tell the City how it could remove him; his only obligation was to show that it could not remove him by following § 3.35(16), MGO. He has not been tardy in pressing that claim.

The doctrine of laches is based on principles of fairness: that a party may not delay prosecuting his or her claim so long that the defendant is prejudiced in making a defense. *See* ***Flessas***, 140 Wis.2d at 127, 409 N.W.2d at 410. We fail to see how the City has been prejudiced in this respect. Whether Parks was subject to removal under the civil service ordinance is a question of law which can be as easily argued and answered now as when he was discharged. We are not ordering the trial court to reinstate Parks and, possibly, "bump" a present employee. We do not require the City to pay Parks damages other than the wages and benefits to which he was entitled.

The City attempts by its laches argument to relitigate the *res judicata* (claim preclusion) defense we rejected in ***Parks v. City of Madison***, 171 Wis.2d 730, 492 N.W.2d 365 (Ct. App. 1992). However, it is the law of the case that Parks's "avalanche of litigation," ***id***. at 733, 492 N.W.2d at 367, in the wake of his firing, does not bar him from maintaining this action.

The City insists, however, that Parks waived mandamus relief because he attempted to obtain relief by exhausting the administrative remedies available to him. In view of the state of the law as to "exhaustion," it was merely careful lawyering to attempt to obtain relief through whatever non-judicial remedies were available before seeking judicial relief. *See* ***Lindas v. Cady***, 183 Wis.2d 547, 515 N.W.2d 458 (1994).

The City makes two further arguments as to why we should affirm the judgment. First, the City argues that it is useless to reinstate Parks because the common council will simply confirm his discharge. We have not directed the trial court to order the City to reinstate Parks. This argument is therefore moot.

Finally, the City argues that we should affirm the trial court's dismissal of Parks's petition because the City substantially complied with §§ 17.12 and 17.16, STATS. We will not again recite the substantive differences between the suspension and removal procedures under these statutes and § 3.35(16)(a), MGO. However, procedurally, Parks was denied a public hearing; he was discharged by the Mayor, not the common council; and he was not removed by a three-fourths vote of the common council. The City's argument is plainly without merit.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

EICH, C.J. (*dissenting*). The controlling issue on this appeal is whether Parks was appointed to a position "subject to a civil service ... law" within the meaning of § 17.12(4), STATS. If he was, the trial court correctly dismissed his petition because the termination of his employment as affirmative action officer was properly conducted under city civil service removal procedures. If he was not, as the majority holds, the trial court erred in dismissing his petition. I believe he was, and I would therefore affirm the trial court's order.

Resolution of the issue centers on which of two sections of the Madison General Ordinances controls the status of the position: § 3.35, which lists the position of affirmative action officer, along with dozens of other city jobs, as outside the civil service; or § 3.58, an ordinance dealing specifically with the position, which states that "[t]he Director of Affirmative Action shall receive all the benefits and incidents of civil service." Despite the majority opinion's assertion that such an interpretation "is illogical and unreasonable"--an assertion with which, obviously, I wholeheartedly disagree--I conclude that Parks's position was "subject to a civil service law" within the meaning of § 17.12(4), STATS. *See* maj. op. at 6.

If there is not a palpable conflict between the two ordinances, there certainly is the appearance of one. The general provisions of the city's civil service ordinance state:

3.35 CIVIL SERVICE SYSTEM

> (1) Civil Service Created - Exceptions Therefrom. There is hereby created a civil service system for the City of Madison.... All City officers and employees except those specified below shall be selected, hold their status and be subject to Section 3.35 of the Madison General Ordinances.

There follows a listing of thirty or so positions, including that of "Affirmative Action Officer."

Another ordinance, the specific ordinance relating to the position of affirmative action officer, provides:

3.58 AFFIRMATIVE ACTION ORDINANCE

> (2) Affirmative Action Department. There is hereby created a Department of Affirmative Action. The Department ... shall be managed and directed by a Director of Affirmative Action, who shall have responsibility and authority for the development and implementation of the City's Affirmative Action Program.... *The Director of Affirmative Action shall receive all the benefits and incidents of civil service* subject to the five (5) year [appointive] term.

(Emphasis added.)

"It is a cardinal rule of statutory construction ... that when a general and a specific statute relate to the same subject matter, the specific statute controls," ***Payment of Witness Fees in State v. Huisman***, 167 Wis.2d 168, 174, 482 N.W.2d 665, 667-68 (Ct. App. 1992), and I believe the rule applies here.

Additionally, as the city points out, specific ordinances relating to various other city positions--even though they, like that of the affirmative action officer, are listed as "except[ions]" to the civil service provisions in § 3.35, MGO--expressly state that the positions are *not* within the civil service;[2] and such language would be wholly unnecessary if the common council, in enacting § 3.35(1) intended to unequivocally and unconditionally mandate exclusion of all the listed positions from the city's civil service system.

A more reasonable reading of the ordinances is that § 3.35(1), MGO, is a general provision establishing a civil service system for the city and mandating, as a general matter and with some exceptions, that all city officials and employees are subject to its provisions--but that it was not intended to foreclose the expression of a contrary intent in a specific ordinance creating a

[2] *See, e.g.*, § 3.04(1), MGO (assistants to the mayor "shall not be covered by the civil service ordinances"); § 3.48(3), MGO (position of human resource director "is not within the City's Civil Service system"); § 3.69(8)(d), MGO (position of executive director of the community development authority "shall have the status of a noncivil service appointment").

position and setting forth its accouterments, powers and duties. Such a result, in my opinion, supplies the necessary harmony to two apparently conflicting provisions,[3] and I believe the trial court appropriately resolved the conflict.

Because I respectfully disagree with the conclusions on which the majority opinion is based, I would affirm the trial court's order dismissing Parks's petition.

[3] Apparently conflicting provisions of a statute are to be read together and construed so as to harmonize them and thus give effect to the statute's "leading idea." ***State v. Schaller***, 70 Wis.2d 107, 110, 233 N.W.2d 416, 418 (1975).